

LEROY PEDERSEN

IBLA 79-256

Decided July 15, 1981

Appeal from decision of the California State Office, Bureau of Land Management (BLM), denying the request for suspension of hardrock prospecting permit CA 1698.

Set aside and remanded.

1. Mineral Lands: Prospecting Permits

Where, pursuant to 43 CFR Part 3510, BLM grants a 2-year permit for hardrock mineral prospecting on certain acquired national forest lands with the concurrence of the Forest Service and Geological Survey, and thereafter fails to approve the permittee's operating plan during the term of the permit and a 2-year extension, the permit will be considered to have been suspended during that period and the permittee granted a 2-year term for prospecting with the right to apply for an extension as provided by the regulations.

APPEARANCES: Leroy Pedersen, pro se.

## OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Leroy Pedersen has appealed from the February 2, 1979, decision of the California State Office, Bureau of Land Management (BLM), denying his request for suspension of his acquired lands hardrock prospecting permit CA 1698. The permit was issued for prospecting gold and tungsten for a 2-year term beginning August 1, 1975, and was extended through July 31, 1979.

Pedersen's permit covers acquired lands in the Tahoe and Plumas National Forests along a ridge which is the common boundary between the two forests. The area lies on the northeastern boundary of the East Yuba RARE II area. The Pacific Crest Trail presently runs generally along the ridge between the two forests.

Pedersen applied for the permit at issue on March 6, 1974. BLM then requested review and recommendations as to approval of the permit from the Forest Service (FS) and Geological Survey (Survey). FS prepared an environmental analysis report (EAR) and a title report which it submitted to BLM on December 18, 1974. It recommended that the permit be issued but specified certain management requirements and constraints to be included in the permit conditions and Pedersen's operating plan. Survey recommended that the permit be allowed subject to certain stipulations. Pedersen agreed to the conditions and submitted a revised operating plan on July 1, 1975. BLM issued the prospecting permit on August 1, 1975, subject to the further condition that

prospecting operations could not begin until the operating plan was approved. 1/

In February 1977 Survey informed Pedersen that completion of the environmental analysis of his plan had been delayed pending receipt of archeological and historical data from FS. 2/ Based on this information, Pedersen requested a 2-year extension of his permit through July 31, 1979, which BLM approved in January 1978. In a separate request, Pedersen asked that the rental he paid for the first 2 years of the permit be refunded because he had not been allowed to do any exploration. In March 1978 BLM denied this request. Pedersen then appealed to this Board on this issue. He also appealed a statement by an FS officer indicating that FS would not approve a mineral lease for the land in CA 1698 in the future and would request that BLM cancel Pedersen's permit. 3/ By order dated December 27, 1978, the Board

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1/ In 1976 Pedersen also located 30 lode mining claims, known as the Pinnacle 1 through 4 and Alpine 1 through 26 claims, on national forest lands which are adjacent to the permit lands and were open to mineral location. After doing preliminary prospecting, he filed a prospecting plan for these claims with FS. In Mar. 1979 FS issued a final environmental analysis report recommending approval of the plan without need for an environmental impact statement. California State Senator John H. Nejedly, who has objected to these claims as well as permit CA 1698, appealed this determination and requested a stay of operations. The Department of Agriculture granted the stay as of May 29, 1979. We are unaware as to whether Pedersen has yet been allowed to prospect these claims.

2/ According to an FS situation summary dated Mar. 20, 1978, FS sent a report on the archeological survey of the lands encompassed by Pedersen's permit to Survey on Feb. 15, 1977. This report does not appear in the permit case file now before the Board.

3/ FS requested that BLM cancel the prospecting permit because it conflicted with the National Forest Multiple Use Management Plan for the area and FS had concluded that it should not have consented to the permit in the first place. BLM determined that it did not have the authority to rescind or cancel the permit for this reason.

dismissed the appeal from the FS actions as the Board lacks jurisdiction to entertain an appeal from a decision of an FS official. We set aside the BLM decision denying a refund and remanded the matter.

We held that it was

premature to decide whether a refund can be authorized until it is determined if the permittee has or will have any right of enjoyment from the permit or that the permit was erroneously issued because of a mistake of fact or law. \* \* \* [A] refund may not be authorized while appellant seeks rights under the permit.

Survey apparently issued a draft EAR on Pedersen's operating plan for comment in December 1978, and the final EAR on April 23, 1979. On May 2, 1979, the Survey Conservation Manager for the Western Region determined that the plan could be approved without preparing an environmental impact statement (EIS). BLM then approved the plan on May 23, 1979, approximately 2 months before Pedersen's permit was to expire. <sup>4/</sup>

On January 10, 1979, Pedersen requested "a four (4) year suspension of the payment and prospecting period terms of my Prospecting Permit CA 1698, to be effective between the effective date (August 31, 1975) of [the permit] and the date on which the Area Mining Supervisor [Survey], approves my Prospecting Plan submitted July 1, 1975." BLM issued the decision now on appeal on February 2, 1979, denying the suspension on the ground that the regulations do not provide for suspension.

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<sup>4/</sup> Neither the draft nor final EAR appear in the permit case file. References to their issuance are found in correspondence from Pedersen to BLM dated Jan. 10, 1979, and to Survey dated Aug. 1, 1979. Record of the Survey and BLM determinations also does not appear in the file, though reference to them is found in other correspondence.

On February 26, 1979, appellant wrote Survey, enclosing data to substantiate the existence of commercial quantities of ore in the permit area, and requesting a preference right lease. He acknowledged that "due to circumstances beyond his control" he had been unable to comply with all the requirements of the permit, and sought a determination from Survey on whether or not he qualified for a lease. Survey replied on June 25, 1979, that the data submitted would not "indicate conclusively that valuable deposits of gold, tungsten, or other heavy minerals have been discovered in the permit area."

This appeal involves only the question whether or not denial of the request for suspension of the permit was proper. In his statement of reasons, appellant charges inter alia, that failure to approve the prospecting plan in time to complete the prospecting work outlined therein would be a breach of contract if the permit is not retroactively suspended to allow 4 years of prospecting. He emphasizes that he is not seeking a refund of the rental payments, but rather continues to seek his rights under the permit. He also asserts that due to weather conditions, his claim is accessible only 3 months of each year, giving him only 12 months of prospecting time in a 4-year period. He argues that this is discriminatory and inequitable vis-a-vis permittees in more temperate climates. He further argues that his permit, issued in 1975 predated the FS RARE II Wilderness Review begun in June 1978 and completed in January 1979, with the lands being designated for "further planning," thereby giving appellant "grandfather rights" unavailable under a new permit. He asserts that the Department was negligent in not approving the prospecting plan.

[1] Prospecting permits are issued pursuant to Departmental regulations at 43 CFR Part 3510. Issuance of a permit grants to "the permittee the exclusive right to prospect on and explore the lands involved to determine the existence of, or workability of, and commercial value of the mineral deposits therein." 43 CFR 3510.1-2. This right, however, may be limited by the conditions imposed by other regulations or as set forth in the permit itself.

The regulations at Part 3510 impose only one condition on activities pursuant to a prospecting permit. Thus, 43 CFR 3510.1-2 states that when the permittee prospects or explores "[o]nly such material may be removed from the lands as is necessary for experimental work or the demonstration of the existence of [mineral] deposits in commercial quantities." The permit issued by BLM, by its terms, however, imposes additional conditions and responsibilities with which the permittee agrees to comply.

For the purpose of this appeal we must examine those conditions which appellant, the permittee, agreed to meet before prospecting operations could begin even though BLM had issued the prospecting permits. First, the standard permit form requires that appellant comply with Survey operating regulations found at 30 CFR Parts 211 and 231. 5/ In addition, appellant's permit also required compliance with BLM regulations, 43 CFR Part 23. These sets of regulations are similar, each

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5/ 30 CFR 211 deals with coal mining and is therefore inapplicable to appellant.

governing prospecting, exploration, and other mining activities on public lands.

The focus of this appeal, more particularly, is on the requirements of 30 CFR 231.10 and 43 CFR 23.7. Both provisions specify that the Survey mining supervisor after consultation with other involved agencies, or the BLM district manager under 43 CFR 23.7, must approve a permittee's operating plan before prospecting may begin on the permit lands. Both the Survey and the BLM regulations also state specifically that no operations shall be performed except under an approved plan. 30 CFR 231.10(a); 43 CFR 23.7(e) and 23.8(g).

In addition to these Departmental approvals, section 2(c) of appellant's permit specifies that appellant "shall not prospect lands under the administrative jurisdiction of the Forest Service without prior notice to and consent of that Service to a plan for prospecting." As the lands involved in this case were acquired by FS for purposes of the national forests, the FS approval must be viewed in the context of 16 U.S.C. § 520 (1976), which governs prospecting and development on acquired forest lands, and section 402 of the Reorganization Plan No. 3 which transferred the functions of the Secretary of Agriculture under that section to the Secretary of the Interior. Section 402 further provided that mineral development on such acquired lands shall be authorized only when the Secretary of Agriculture advises the Secretary of the Interior that development will not interfere with the purposes for which the land was acquired and only in accordance with conditions specified by the Secretary of Agriculture to protect those purposes.

Appellant does not challenge the appropriateness or validity of these conditions. The identified Departmental regulations are designed to promote the Departmental policy of encouraging development of mineral resources in a manner which protects the environment and the public health and safety. 43 CFR 23.1; 30 CFR 231.1(b). Appellant, in effect, asserts that BLM may not impose such conditions in a manner which deprives a permittee of the rights granted to him under the permit. In this case the lengthy process involved in approving appellant's operating plan has, in effect, nullified appellant's permit.

The issue is one of reasonable timeliness by the Governmental agencies in taking the necessary action. On July 1, 1975, appellant submitted his operating plan revised to conform to the requirements identified by FS and Survey prior to permit issuance. An EAR recommending approval of the plan was not issued by Survey apparently until April 1979. There is little in the case record to indicate the reason that the Survey review took almost 4 years, though it appears that some delay was caused by FS not submitting its report in a prompt manner. No other problems are addressed.

Both sets of operating regulations envision prompt approval of prospecting plans. The BLM regulations provide that "[t]he mining supervisor or the district manager shall promptly review the exploration plan submitted to him by the operator and shall indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to \* \* \* [these regulations and the permit]." 43 CFR 23.7(d) (emphasis added). Survey regulations specify that "[t]he



mining supervisor shall consult with the other agencies involved, and shall promptly approve the plans or indicate what modifications of the plans are necessary \* \* \*." 30 CFR 231.10(a) (emphasis added).

Where, by regulation, prompt review and approval is required, we find it unreasonable for approval of an operating plan under a 2-year permit, upon which all rights granted by the permit are conditioned, to take almost 4 years.

Environmental review is an important and necessary condition to approval of activities on Federal lands. The regulations at 43 CFR Part 3510 specifically governing prospecting permits, however do not address such environmental review and, more significant in this case, they do not provide any procedural means by which to remedy the problem caused by the time involved in reviewing the environmental impact of appellant's operating plan. The 2-year permit term was first promulgated at 43 CFR 200.35 in 1958 (see 23 FR 3775 (May 30, 1958)), long before passage of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976), or the promulgation of the regulations in 43 CFR Part 23 in 1969 (see 34 FR 852 (Jan. 18, 1969)), and 30 CFR Part 231 in 1972 (see 37 FR 11041 (June 1, 1972)). It is obvious, at least in this case, that the time involved in obtaining approval of the operating plan during the permit term does not serve the particular purpose of the permit system which is to regulate prospecting on public land, or the general purpose of encouraging development of public minerals resources. The time taken for environmental review in this case

has rendered the permit useless. 6/ It would have been better to have required all approvals before issuance of the permit to avoid the problems that have arisen in this case.

BLM's issuance of prospecting permit CA 1698 in the first place evidences an intent, with Survey and FS concurrences, that appellant be allowed to prospect the lands covered by the permit. To date appellant has not been allowed to prospect or explore during the term of the permit. The issuance of a permit under such circumstances is a meaningless action from which appellant clearly has derived no benefit. It appears that appellant has done everything required of him in good faith. In the interest of fairness, we hold that when all approvals are finalized, appellant shall be allowed to prospect for a 2-year period under permit CA 1698 with the rights to request a 2-year extension under the regulations if warranted at the end of the first term. The 2-year period shall run either from the date of service of this decision or the date when approval of appellant's operating plan is finalized, whichever is later. 7/

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6/ As we have indicated the case file does not specifically reflect the reasons for the length of time involved in reviewing appellant's operating plan. It is clear that appellant believes that the delay has in large part been the result of alleged interference by California State Senator Nejedly. We wish to point out that the requirement for the consideration of the environmental impact of particular Federal actions is in part designed such that the views and interests of concerned citizens become part of the Governmental decisionmaking process. However, we are also concerned that, in a case such as the one now before us, the input from such concerned citizens does not become a tool for obstructing the rights of others.

7/ References in the case file indicate that BLM did approve the plan in 1979 although no actual record of such approval appears in the case file. If such approval was given, the 2-year term shall run from the date of service of this decision. If such approval must still be finalized, the 2-year term shall run from the date of final approval.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this decision.

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Gail M. Frazier  
Administrative Judge

We concur:

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James L. Burski  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge